

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT
PRETORIA

CASE NO: 54447/12

6/12/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
6 NOVEMBER 2012	
DATE	SIGNATURE

In the matter between:

ZOECO SYSTEM MANAGERS CC

Applicant

and

MINISTER OF SAFETY AND SECURITY N.O.

First Respondent

**THE PROVINCIAL COMMISSIONER OF SAPS,
MPUMALANGA N.O.**

Second Respondent

WARRANT OFFICER M C TSOAI N.O.

Third Respondent

THE MAGISTRATE, WITBANK N.O.

Fourth Respondent

J U D G M E N T

TEFFO, J:

[1] The applicant brought an urgent application against the respondents where it seeks an order for the return of the following movable properties which were seized by the servants of the first respondent namely:

- 1.1 19 Computer boxes;
- 1.2 20 Screens;
- 1.3 16 Flash drives;
- 1.4 1 Keyboard;
- 1.5 1 Printer;
- 1.6 1 Router;
- 1.7 Cash in the amount of R10 718,30;
- 1.8 1 Cash register with keys;
- 1.9 1 Lucky draw drums with keys;
- 1.10 Slips and receipts;
- 1.11 Keys and envelopes.

[2] The application is opposed.

[3] The following facts are common cause between the parties:

- 3.1 The aforementioned goods were confiscated on 6 September 2012 from the applicant's business premises.
- 3.2 The police seized the said goods in terms of a search warrant that was issued by the fourth respondent in her capacity as the Magistrate, Witbank in terms of section 21 of the Criminal Procedure Act 51 of 1977 (*"the Act"*).
- 3.3 The warrant was issued on the strength of an affidavit deposed to by Warrant Officer Tsoai, the third respondent in this matter.
- 3.4 There was a previous search warrant which was also issued by the fourth respondent in terms of which goods were confiscated from the applicant's business premises on 4 May 2012 by the servants of the first respondent.
- 3.5 The aforementioned goods were returned to the applicant after it had launched an urgent application in this Court due to the invalidity of the abovementioned search warrant.

[4] The applicant challenges the validity of the search warrant that resulted in the search of its premises on 6 September 2012 and the seizure of the aforementioned goods. It claims the return of all the goods seized in terms of a mandament van spolie.

URGENCY

[5] The applicant contends that the executors of the warrant did not only dispossess it of the articles seized. They also despoiled it of the use of its business premises. The executors of the warrant, after the search and seizure, locked up the business premises and took the keys.

[6] The applicant trades as an internet café providing electronic internet facilities and related facilities to the public.

[7] It contends further that its dispossession of the premises is continuing and it has to pay rent in respect of the business premises.

[8] It is also the applicant's contention that it continues to pay staff salaries and water and electricity accounts for the business premises.

[9] Accordingly it faces dire financial consequences if the dispossession of its business is allowed to continue.

[10] According to the applicant the search and the seizures were done in a manner to cripple the business.

[11] The applicant contends that the warrant is bad in law and the execution thereof was done in a way which brings the administration of justice into dispute.

[12] The applicant states that where there was an unlawful exercise of public power, society demands that it be corrected speedily so as not to lose confidence in the state organs involved.

[13] It further states that if it has to bring this application in the ordinary course of events, it would have lost the business premises, become financially crippled and would have lost all the goodwill that the business built up.

[14] It alleges that the search and seizure constitutes an infringement of its right to privacy as guaranteed by section 14 of the Constitution Act of South Africa, 1996 (*"the Constitution"*).

[15] It contends that its urgency as referred to above, is based on commercial urgency and that there are therefore special circumstances that render the matter urgent.

[16] On the other hand the respondents deny the applicant's allegations and submissions relating to the urgency of the matter.

[17] The issues for determination are the following:

17.1 Whether the applicant is entitled to bring this application by way of urgency.

17.2 Whether the applicant is entitled to the relief sought in terms of prayer 2 of the notice of motion.

[18] Rules 6(12)(a) and (b) provide as follows:

- “(a) *In urgent applications the court or a judge may dispense with the form and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.*
- (b) *In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at the hearing in due course.”*

[19] In *Caledon Street Restaurant CC 1998 JOL 1832 SE*, Kroon J summarised the rules which pertain to urgent applications as follows:

“Subject to the provisions of Rule 6(12) of the Uniform Rules of Court, the provisions of Rule 6(5) are peremptory. Rule 6(5)(a) provides that an application must be in a form as near as may be in accordance with Form 2(a). In terms of Rule 6(5)(b) an applicant is obliged to nominate a day at least five days after service on the respondent, on or before which the respondent must notify the applicant of the intended opposition. Rule 6(5)(d)(ii) provides that within 15 days of such notification, the respondent who is opposing the application must file opposing affidavits. Sub-rule 5(f) provides for the application thereafter to the registrar for a date for the hearing of the matter, the date on which the registrar may be so approached depending on whether or not the replying papers are filed by the applicant, which is also to be done within a prescribed time period.”

[20] The applicant contends that it determined in accordance with the degree of urgency of the matter, shortened time frames in its notice of motion, within which the respondents had to give notice of their opposition and file their answering affidavits on or before Tuesday, 25 September 2012. It also pointed out that the respondents elected to completely ignore the time frames as set out in the notice of motion. Both parties' attorneys of record communicated with each other and this led to the removal of the matter from the roll of 2 October 2012. According to the applicant the respondents filed its notice of intention to oppose on 1 October 2012, a day prior to the date on which the matter was originally enrolled. The parties as a result agreed that the matter be removed from the roll and re-enrolled for 9 October 2012. This was done according to the applicant to avoid non-compliance with the Practice Directive in this Court and to ensure that all papers would be in court on the day of the hearing. The respondents were then requested by the applicant's attorney to ensure that their answering affidavit be filed by not later than 2 October 2012. The applicant contends further that this was not done and on 4 October 2012 it received unsigned copies of the respondents' answering affidavit. This therefore made it impossible for the replying affidavit to be prepared and filed before 12h00 on Thursday preceding 9 October 2012 for the hearing of the matter. The replying affidavit was then prepared and filed on 4 October 2012. As a result the matter was then re-enrolled for 16 October 2012. The applicant maintains that the removal and re-enrolling of the matter cannot be used against it to frustrate the bringing of its application in the urgent court. All this was done as a result of the respondents who ignored the time frames which were set out in the notice of motion. It further

contends that the respondents did not advance reasons why they chose to ignore the time frames or why was that necessitated. It is also contended that the respondents do not claim any prejudice in so far as the shortened time periods are concerned but rather chose to rely on the perceived illegal business as the basis for not rendering the application urgent.

[21] The applicant contends that up and until 4 May 2012, it was in peaceful and undisturbed possession of all the items that were on the premises.

[22] The respondents on the other hand contend that spoliation applications are by their very nature not urgent. They deny that the articles were seized without justification and that the applicant is entitled to conduct business and earn a livelihood by way of gambling activities. According to the respondents the applicant runs an illegal interactive gambling business.

[23] Counsel for the respondents did not take issue on whether or not the matter is urgent.

[24] In an application of this nature, the applicant has to satisfy two requirements. The applicant has first to show that it would suffer real loss or damage if it has to rely solely or substantially on the normal procedure provided for in the Uniform Rules of Court. Secondly, it has to be determined whether the deviation from the prescribed time limits would not prejudice the respondents (*Vukani Gaming Eastern Cape (Pty) Ltd and Others v Eastern*

Cape Gambling and Betting Board Case No 606/10 Eastern Cape High Court).

[25] From the applicant's submissions it is clear that since the respondents searched its premises, seized items from the premises and locked them up, it cannot continue to run its business. It continues to suffer real loss or damage as it cannot use its business premises. It therefore faces dire financial consequences if the dispossession of its business is allowed to continue. No evidence has been adduced on the papers to the effect that deviation from the prescribed time limits would prejudice the respondents. What comes out from the respondents' contentions is that the applicant is conducting an illegal gambling business at the premises. It is clear from the papers that the applicant did what it could to bring the matter to court on an urgent basis. It wanted to comply with the rules and the respondents ignored the time frames within which they were to file their papers. From the above facts and submissions I am persuaded that the applicant has satisfied the requirements of Rule 6(12) in bringing this application by way of urgency.

[26] The applicant contends that there was unlawful dispossession of the items in its possession as the warrant which was issued as statutory authorisation for the search and seizure, was *ultra vires* the provisions of the Act.

[27] The *onus* is however on the first to third respondents to prove on a balance of probabilities that the warrant was valid.

[28] The affidavit deposed to by the third respondent states the following:

28.1 He received information from the Mpumalanga Gaming Board that illegal gambling activities were taking place at the applicant's premises.

28.2 He went to the premises where he observed people entering and exiting the premises, from which some kind of business was clearly being conducted.

28.3 The applicant does not have a licence to operate any gambling business at the premises.

28.4 In order to gather evidence that illegal gambling activities were taking place at the premises, he applied for authority in terms of section 252A of the Act to make use of agents to conduct a police action at the premises.

28.5 The agents were supplied with money for purposes of going to the premises to gamble.

28.6 During the police action at the premises the following evidence was gathered:

- 28.6.1 People entering the premises exchange money for a voucher with a pin number.
- 28.6.2 The pin number is loaded on a computer on which various gambling games are available.
- 28.6.3 The amount on the voucher is reflected on the computer giving access to the various gambling games by way of indicating the amount for gambling purposes.
- 28.6.4 In the event of money being won in gambling, the voucher is presented to the cashier at the premises and the winnings are paid in cash by the cashier.
- 28.7 On completion of the police action in terms of section 252A of the Act, a search warrant was obtained for the search of the premises and seizure of the articles.
- 28.8 On 4 May 2012 articles were seized at the applicant's premises in terms of the search warrant referred to above.
- 28.9 The applicant then brought an urgent application in this Court for the return of the articles seized on 4 May 2012.

28.10 Due to the invalidity of the search warrant which was issued for the search of the premises on 4 May 2012 as a result of certain legal requirements not having been met, the articles seized on 4 May 2012, were returned to the applicant.

28.11 After the articles seized on 4 May 2012 were returned to the applicant the third respondent received information on a regular basis that illegal gambling activities continued on the premises.

[29] The respondents contend that on the strength of the affidavits deposed to by the third respondent:

29.1 It appeared to the fourth respondent that the applicant was conducting an illegal interactive gambling business on the premises.

29.2 There were reasonable grounds for believing that articles referred to in section 20 of the Act were on the premises.

29.3 There was more than sufficient information to justify the issuing of the search warrant by the fourth respondent.

29.4 The issuing of the search warrant is not indicative of any failure on the part of the fourth respondent properly to apply his mind to the matter.

29.5 The search warrant was validly issued by the fourth respondent.

[30] The applicant contends that the contents of the affidavit by the third respondent describes in full detail all the steps that were taken prior to the raid in May 2012.

[31] It contends further that the third respondent did not disclose in the affidavit which items were seized at its premises on 4 May 2012. He only states that due to the invalidity of the warrant all the articles seized on 4 May 2012 were returned to the applicant.

[32] It is the applicant's further contention that the third respondent makes a generalised statement that after the return of the items that were seized in May 2012, he received information that "*they just continue with this illegal gambling activities at the premises*". He does not disclose who have this information, what was the nature thereof. Further he states that he now even strongly believe that items on the premises were involved in or can produce proof of the commission of certain crimes.

[33] The applicant also made the following submissions:

33.1 The third respondent's affidavit is silent on:

33.1.1 Any observation whether the items described in the original warrant of May 2012 and seized

thereunder, remained on the premises after it was returned.

33.1.2 Whether any further observation revealed that it was suspected to be used in connection with the new crime other than that he received information that the illegal gambling activities continued.

33.1.3 Whether the current warrant is sought as the seizure is in respect of the old suspected offence and that the items were needed for evidence in that regard or whether the warrant has been sought for the new suspected commission of the offences.

[34] According to the applicant there is absolutely no information on oath before the fourth respondent to create a suspicion that the items described in Annexure "D" were on the premises, or that the third respondent or anybody else observed the business after May 2012. The items described in Annexure "D" to the warrant are described in wide and vague terms and cannot even reasonably be associated with a search and seizure where the statutory offence is internet gambling. There is no basis set out in the affidavits why cellphones, audio and video footage, etc, had to be search for. The statement is silent on whether electronic and computer equipment and software are

indeed present at the premises and why any such items are part of the suspected offence.

[35] The applicant also contends that had the fourth respondent applied her mind to the matter at hand, she could never have formed the reasonable suspicion on the information under oath that there was sufficient information to justify the issue of the warrant.

[36] In terms of section 21(1)(a) of the Act, a magistrate may issue a search and seizure warrant for the seizure of an article referred to in section 20 *"if it appears to such magistrate from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or at any premises within his area of jurisdiction"*.

[37] In terms of section 20 of the Act, an article which is liable to seizure by the State includes any article:

37.1 Which is concerned in or is on reasonable grounds believed to be concerned in the commission of an offence.

37.2 Which may afford evidence of the commission or suspected commission of an offence.

[38] In *Minister of Safety and Security v Van der Merwe and Others* 2011

(2) SACR 301 (CC) the following remarks were made:

"Sections 20 and 21 of the CPA give authority to judicial officers to issue search and seizure warrants. The judicious exercise of this power by them enhances protection against unnecessary infringement. They possess qualities and skills essential for the proper exercise of this power, like independence and the ability to evaluate relevant information so as to make an informed decision.

Secondly, the section requires that the decision to issue a warrant be made only if the affidavit in support of the application contains the following objective jurisdictional facts: (i) the existence of a reasonable suspicion that a crime has been committed and (ii) the existence of reasonable grounds to believe that objects connected with the offence may be found on the premises or persons intended to be searched. Both jurisdictional facts play a critical role in ensuring that the rights of a searched person are not lightly interfered with. When even one of them is missing that should spell doom to the application for a warrant."

[39] The court goes on to state that *"the third safeguard relates to the terms of the warrant. They should not be too general. To achieve this the scope of the search must be defined with adequate particularity to avoid vagueness or overbreadth. The search and seizure operation must be confined to those premises and articles which have a bearing on the offence under investigation. The last safeguard comprises the grounds on which an aggrieved searched person may rely in a court challenge to the validity of a warrant. The challenge could be based on vagueness, overbreadth or the absence of jurisdictional facts that are foundational to the issuing of a warrant"*. (*Minister of Safety and Security v Van der Merwe and Others, supra*).

[40] The court continued to state that the principle of intelligibility requires that even in the case of a CPA warrants "*the person whose premises are being invaded should know why*" (*Minister of Safety and Security v Van der Merwe and Others, supra*).

[41] The court then held that:

"What emerges from this analysis is that a valid warrant is one that, in a reasonably intelligent manner:

1. *states the statutory provision in terms of which it is issued;*
2. *identifies the searcher;*
3. *clearly mentions the authority it confers upon the searcher;*
4. *identifies the person, container or the premises to be searched;*
5. *describes the articles to be searched for and seized, with sufficient particularity; and*
6. *specifies the offence which triggered the criminal investigation and names the suspected offender."*

(Minister of Safety and Security v Van der Merwe and Others, supra.)

[42] The court then gave the following guidelines to be observed by a court considering the validity of the warrants:

- 42.1 The person issuing the warrant must have authority and jurisdiction.

42.2 The person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts.

42.3 The terms of the warrant must be neither vague nor overbroad.

42.4 A warrant must be reasonably intelligible to both the searcher and the searched person.

42.5 The court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights.

42.6 The terms of the warrant must be construed with reasonable strictness.

[43] Information must be placed on oath before a judicial officer (which can include hearsay information) from which it appears to such judicial officer that there are reasonable grounds for believing that an article referred to in section 20 of the CPA is within his or her jurisdiction.

[44] The "*reasonable grounds for believing*" in section 21(1)(a) are not grounds measuring up to an objective standard, but are grounds which in the subjective opinion of the judicial officer are reasonable (*Mandela and Others v Minister of Safety and Security and Another* 1995 (2) SACR 397 (W) at 404g-i).

[45] The belief on the part of the judicial officer that there are reasonable grounds to believe that the article in question is an article referred to in section 20 of the CPA is not objectively justiciable. The court may therefore not interfere with the judicial officer's decision merely because the decision is considered to be wrong (*Mandela and Others v Minister of Safety and Security and Another, supra*, at 404).

[46] The court will interfere with the judicial officer's decision to issue a search warrant in terms of section 21(1)(a) of the CPA in limited circumstances only, for example, if the judicial officer had not properly applied his mind to the matter (*Mandela and Others v Minister of Safety and Security and Another, supra* at 404j-405a).

[47] Applying the above legal principles to the present matter, it is clear from the papers that the affidavit by the third respondent explains in full detail the events that led to the issue of the search and seizure warrant and the search and the seizure of the articles at the applicant's business premises on 4 May 2012. Owing to the invalidity of that search and seizure warrant, the articles seized at the applicant's business premises were returned. In his statement the third respondent does not mention which articles have been returned to the applicant. Four months later a new warrant was issued by the fourth respondent based also on information under oath by the third respondent to the effect that after the return of the articles that were seized at the applicant's business premises in May 2012, he received information on regular basis that "*they just continue with illegal gambling activities at the*

premises". He further states that he now has even stronger reasonable grounds to believe that items on the premises were involved in and/or can produce proof of the commission of the crimes under the relevant gambling legislation. On this basis he continues to state that these items should be seized in terms of the relevant provisions of the Act. The third respondent further states that the defects in the previous application which emanated in the faulty search warrant have now been rectified. This statement is concluded by the words "*I therefore apply for a search warrant to seize the items mentioned in Annexure 'D' to this statement*".

[48] On 6 September 2012 the third respondent and members of the first respondent visited the applicant's business premises, searched and seized the articles in terms of the new warrant that was issued.

[49] In his statement that led to the issue of the above warrant in terms of which a search and seizure of articles was done at the applicant's business premises on 6 September 2012, the third respondent does not give information in detail as to what transpired that led to the issue of the warrant. Nothing from the statement explains the events after the return of the articles that were seized on 4 May 2012 and what actually transpired until on 6 September 2012. He just states in general terms that he received information on regular basis that they just continued with illegal gambling activities. He does not state that him or his colleague visited the business premises again and found that the illegal gambling continued. The source of information, its nature and status is not disclosed. No reasons are advanced as to why such

information should be relied upon (*Minister of Safety and Security v Ndiniso* 2007 (SCA) 29 RSA).

[50] The applicant contends that it never received Annexure "D" before the hearing of the matter. The fact that this new warrant was applied for to search and seize the articles allegedly mentioned in Annexure "D" which was never given to the applicant prior to the hearing of the matter is a clear indication that when the search and the seizure took place on 6 September 2012 the applicant did not know what was to be searched for and seized in terms of the warrant. This warrant did not therefore describe the articles to be searched for and seized, with sufficient particularity.

[51] I also agree with the applicant that the articles listed in Annexure "D" to the warrant of 6 September 2012 are described in wide and vague terms and cannot be reasonably associated with a search or seizure where the offence is internet gambling.

[52] There is also no information from the statement by the third respondent as to what information or defects existed in the warrant that led to the search and seizure of the applicant's business premises on 4 May 2012 and also what was rectified except the information that the defects were rectified.

[53] From the issues raised I find it difficult to accept that sufficient evidence was placed before the fourth respondent to constitute objective jurisdictional

facts which could justify a reasonable suspicion by the fourth respondent regarding a suspected offence or items connected with an offence.

[54] I agree with the applicant's contention that had the fourth respondent applied her mind to the matter, she would have realised that the information contained in the third respondent's statement does not contain or is insufficient to constitute these objective jurisdictional facts.

[55] In *Minister of Safety and Security v Van der Merwe and Others* it was held that both jurisdictional facts namely (i) the existence of a reasonable suspicion that a crime has been committed; and (ii) the existence of reasonable grounds to believe that objects connected with the offence may be found on the premises or persons intended to be searched, play a critical role in ensuring that the rights of a searched person are not lightly interfered with. Further that when even one of them is missing, that should spell doom to the application of the warrant.

[56] In the circumstances I make a finding that the search and seizure warrant issued by the fourth respondent on 6 September 2012 is invalid for the reasons advanced above.

[57] The warrant is therefore set aside.

[58] In *Ivanor v Chairperson North West Gambling Board* 2012 ZASCA 92 the court referred to the case of *Schoeman v Chairperson of the North West Gambling Board* [2005] ZANWHC 81 where the police obtained a search warrant and searched the business premises of the applicant and seized various items. There was no dispute that the machines were gambling machines. That they were in the applicant's possession and that he did not hold a licence or permit issued by the Board to possess them. The applicant sought an interim order declaring the search warrant unlawful and directing the respondents to restore possession to him of all the articles seized. The court dismissed the application on the basis that section 9 of the National Gambling Act precluded him from possessing the machines without a licence. The full court in dismissing the appeal relied on the decision of Carlisle J in *Yuras v District Commandant of Police, Durban* 1952 (2) SA 173 (N) at 173 and held that the appellant was not entitled to an order for the restoration of his machines until he produced an appropriate licence. The court in the *Ivanor* matter concluded that the decision of the full court in *Schoeman* was wrong and overruled. It held that the appellant who was in undisturbed and peaceful possession was entitled to the restoration of his machines once the search warrant was declared unlawful and set aside.

[59] The applicant's contention has always been that prior to 4 May 2012 he was in an undisturbed and peaceful possession of the items that were seized by the third respondent and members of the first respondent on 4 May 2012. After the articles were returned the third respondent and members of the first respondent unlawfully dispossessed it of its equipment, money and the

premises on 6 September 2012. It contends that it was entitled to possession of its articles.

[60] Following the reasoning in the *Ivanor* matter I also find that the applicant is entitled to restoration of all the articles that were seized in terms of the search and seizure warrant that was issued on 6 September 2012.

[61] I therefore make the following order:

61.1 The search and seizure warrant issued by the fourth respondent on 6 September 2012 is declared invalid and set aside.

61.2 The respondents and any other respondent who is in possession or control of the applicant's movable goods and monies listed in Annexure "D" hereto, are directed and ordered to forthwith return and restore possession of the movable goods and monies that were removed by the third respondent and other members of the SAPS (who were under the control of the second respondent) from the applicant's business premises which are situated at Aztec Riches Shop 44C, Saveway Crescent, Mandela Street, Witbank.

61.3 The first to third respondents are ordered to pay the costs jointly and severally, the one paying the other to be absolved.


M J TEFFO
JUDGE OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

FOR THE APPLICANT

N JAGGA

INSTRUCTED BY

VARDAKOS ATTORNEYS

FOR THE FIRST TO THIRD
RESPONDENTS

T W G BESTER

INSTRUCTED BY

THE STATE ATTORNEY

DATE OF HEARING

16 OCTOBER 2012

DATE OF JUDGMENT

6 DECEMBER 2012